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No. 84-197

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT B. SUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in limiting the cross-examination of two prosecution witnesses regarding pending criminal charges.

2. Whether a box of company records that petitioner had ordered destroyed was properly authenticated when it was admitted into evidence.

3. Whether the district court correctly excluded evidence of petitioner's Rule 29 acquittal on other charges that were the object of his obstruction of justice.

4. Whether the district court, at petitioner's second trial, erred in excusing prospective jurors who were aware of his earlier acquittal.

5. Whether the government's evidence was sufficient to establish petitioner's participation in a conspiracy to obstruct justice.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 732 F.2d 1483.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1984. A petition for rehearing was denied on June 4, 1984 (Pet. App. 19a). The petition for a writ of certiorari was filed on August 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following jury trials in the United States District Court for the Northern District of Oklahoma, peti-

tioner was convicted on one count of conspiracy to obstruct justice, in violation of 18 U.S.C. 371, and one count of obstructing justice, in violation of 18 U.S.C. 1505. Petitioner was sentenced to concurrent five-year terms of imprisonment and fined a total of $15,000. The court of appeals affirmed (Pet. App. 1a-18a).

Petitioner was initially charged in a 17-count indictment. Counts One through Fifteen alleged racketeering, mail fraud and wire fraud in the operation of petitioner's two wholly owned oil companies, BPM, Ltd., and Scurry Oil Company. The gist of the government's evidence was that petitioner had engaged in a lucrative scheme of buying price-controlled oil at the low price established by regulations of the Department of Energy (DOE). The oil was then resold at a higher price on the basis of false certifications that it was within the class not subject to price control under DOE regulations. Pursuant to Fed. R. Crim. P. 29, the district court granted a directed verdict of acquittal as to these counts at the close of the government's case.[1] Petitioner was convicted on Count

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[1] This ruling was appealed on an emergency basis before the jury was discharged. A panel of the court of appeals issued a writ of mandamus directing that these counts be reinstated because the circumstances, including statements made by the district court, indicated that the evidence appeared to be sufficient to go to the jury and that it would significantly advance the public interest if all 17 counts went to trial. *United States* v. *Ellison*, 684 F.2d 664 (10th Cir. 1982). The following day the en banc court reversed, however, finding that mandamus was an inappropriate remedy and that reinstating the counts would violate the Double Jeopardy Clause. *United States* v. *Ellison*, 722 F.2d 595 (10th Cir. 1982). The government filed a petition for a writ of mandamus or certiorari in this Court, but the Court denied a

Seventeen, conspiracy to obstruct justice, but the jury was unable to reach a verdict on Count 16, a substantive charge of obstruction of justice. A mistrial was declared on Count Sixteen, and at a second trial a few weeks later petitioner was convicted on the substantive obstruction of justice count.

The evidence regarding the conspiracy and obstruction counts showed the following. On June 30, 1978, a DOE auditor served an administrative subpoena on BPM, Ltd. directing it to produce certain records, including invoices for the purchase and sale of oil, so as to permit DOE to conduct an audit. Petitioner's attorney hired an accountant to analyze the invoices, and the accountant took several boxes of BPM records to his office in Lafayette, Louisiana. Gaylord Simon, a BPM employee, subsequently directed Dennis Briggs, petitioner's employee and brother-in-law, to retrieve the records from the accountant. Briggs obtained all but one of the boxes and stored them in an ice house, where they were subsequently destroyed by vandals. According to Briggs, petitioner had been upset that one of the boxes of BPM records was still in the possession of the accountant and had not been moved to the ice house. Pet. App. 3a.

Another BPM employee later directed Simon to obtain the remaining box of records from the accountant. Simon did so and then went to a restaurant, where he telephoned petitioner. Petitioner told Simon to destroy the records.[2] Simon nevertheless kept the

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stay of the trial proceedings that would have enabled it to consider those filings prior to the discharge of the jury (Pet. App. 2a).

[2] Petitioner told his attorney that he was smarter than President Nixon and that he would destroy the records so that the government could not get them (Pet. App. 17a).

box of records and later gave it to Jack Clothier, a former business associate of petitioner. In January 1980 another of petitioner's attorneys informed the Justice Department that Clothier might have documents subject to the DOE subpoena. The FBI obtained the box of records from Clothier's attorney, and it was found to contain BPM invoices from 1976, 1977, and 1978. Pet. App. 3a-4a.

The conspiracy charge against petitioner was based on his efforts to prevent Clothier and his attorney, William Lambert, from talking to the FBI. In tape recorded conversations, petitioner told Carlos Marcello that he wanted him to prevent Clothier and Lambert from talking to the FBI, and Marcello agreed to assist petitioner. Pet. App. 4a.

Petitioner appealed his convictions, raising 18 distinct claims of error. The court of appeals affirmed (Pet. App. 1a-18a).[3]

ARGUMENT

1. Petitioner contends (Pet. 14-18) that the district court denied him a fair trial by restricting the cross-examination of two prosecution witnesses. This claim is without merit.

At trial, defense counsel sought to cross-examine Jean Brown, petitioner's former employee, and Jack Clothier regarding pending criminal charges filed by the State of Texas. The district court declined to

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[3] On November 29, 1984, petitioner was indicted in the District of Columbia on the following charges: interstate transportation in aid of racketeering, in violation of 18 U.S.C. 1952; bribery, in violation of 18 U.S.C. 201; conspiracy to commit bribery, in violation of 18 U.S.C. 371; and aiding and abetting, in violation of 18 U.S.C. 2. Trial is scheduled to commence on January 24, 1985.

permit specific questioning about the state charges but allowed wide-ranging cross-examination concerning the witnesses' state of mind and any favorable treatment they might expect as a result of testifying for the government (Tr. 712, 719, 725).[4] Petitioner, citing *Davis* v. *Alaska*, 415 U.S. 308 (1974), argues that this restriction on the cross-examination of Brown and Clothier denied him his right under the Sixth Amendment to confront witnesses against him. In particular, petitioner argues that he should have been permitted to attempt to establish Brown's bias on the theory that she blamed petitioner for her criminal difficulties with the State of Texas.

The court of appeals correctly noted, however, that the district court afforded petitioner "great latitude in questioning Brown about her involvement in illegal activities and about any special treatment she might expect to receive because of her testimony" (Pet. App. 8a). This cross-examination of Brown, and also that of Clothier, provided the jury with more than sufficient information to evaluate the bias and motives of the witnesses. Under such circumstances, the Confrontation Clause is not offended by a district court's restriction on additional cross-examination to the same end. *United States* v. *Alonso*, 740 F.2d 862, 875 (11th Cir. 1984); *United States* v. *Falsia*, 724 F.2d 1339, 1343 (9th Cir. 1983).

Moreover, it is well established that the district court possesses broad discretion in controlling the cross-examination of witnesses at trial. See, *e.g.*, *United States* v. *Burke*, 738 F.2d 1225, 1228 (11th Cir. 1984). Accordingly, the court of appeals plainly

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[4] Tr. references are taken from the government's brief in the court of appeals.

was correct that the district court did not abuse its discretion here, and there is no reason for this Court to review petitioner's fact-bound claim.

2. Petitioner contends (Pet. 18-20) that the district court erred by admitting the box of BPM records into evidence without proper authentication. The court of appeals correctly rejected this claim (Pet. App. 8a-9a).

Authentication of proffered evidence is accomplished if sufficient evidence is presented to support a finding that the item in question is what its proponent claims. Rule 901(a), Fed. R. Evid. That standard was satisfied here. Contrary to petitioner's assertion (Pet. 18), the box of records introduced as Government Exhibit 53 was specifically identified by the FBI agent who inventoried the box as containing BPM crude oil invoices for 1976, 1977, and 1978 (Tr. 2915-2916). This, together with the evidence of what documents had originally been placed in the box and the testimony regarding its apparent chain of custody, was more than sufficient to support a finding that Exhibit 53 was what the prosecution claimed it to be—the box of BPM documents that petitioner had ordered destroyed.

Petitioner casts his complaint in terms of a hearsay violation that denies his right to confrontation. Plainly, there is no hearsay problem. The box of BPM records was not introduced to prove the truth of its contents—the purchase and sale prices of crude oil reflected on the BPM invoices. Rather, the box was introduced to establish that it was the item of possibly incriminating evidence that petitioner had directed Simon to destroy. As the court of appeals found (Pet. App. 9a), the evidence was more than sufficient to support that conclusion.

3. Petitioner contends (Pet. 20-22) that he should have been permitted to inform the jury that he had been acquitted on Counts One through Fifteen.[5] This contention is without merit.

The government's theory of prosecution on the obstruction charges was that petitioner was motivated to keep Clothier, Lambert, and the box of BPM invoices away from government investigators because they would provide evidence of a crime—violating DOE oil pricing regulations. Petitioner does not seriously dispute that evidence of this motive was admissible notwithstanding petitioner's Rule 29 acquittal on the underlying charge of violating DOE regulations. See *United States* v. *Gigante*, 729 F.2d 78 (2d Cir. 1984), cert. denied, No. 83-1699 (May 21, 1984). Petitioner complains, however, that he should have been permitted to rebut the force of this evidence of motive by showing that he had been acquitted of the underlying charge.

The court of appeals correctly held (Pet. App. 12a) that the judgment of acquittal was not admissible; while judgments of conviction are exempted by Rule 803(22), Fed. R. Evid., from the hearsay rule, there is no such proviso allowing the admission of a judgment of acquittal. See *United States* v. *Viserto*, 596 F.2d 531, 537 (2d Cir.), cert. denied, 444 U.S. 841 (1979). There is a sound basis for this difference in treatment. A conviction represents a judicial finding of guilt that can be made known to the jury without necessitating a collateral inquiry into the particulars of the crime or the conduct of the prior trial. An acquittal cannot be admitted without inviting just

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[5] The court informed the jury that the first 15 counts had been "otherwise disposed of" (Pet. App. 12a).

such a collateral inquiry into which precise element of the crime the government failed to establish beyond a reasonable doubt. In any event, it is well established that an acquittal is not admissible to rebut inferences that may be drawn from evidence of the underlying conduct. See *United States* v. *Kerley*, 643 F.2d 299, 300 (5th Cir. 1981); *United States* v. *Viserto*, 596 F.2d at 537.[6]

4. Petitioner contends (Pet. 23-25) that he was prejudiced at his second trial by the district court's exclusion of potential jurors who were aware of his prior acquittal. The court of appeals rejected this claim (Pet. App. 14a-15a).

The government has the right to present its case against a criminal defendant to an impartial jury. *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887). The district court possesses broad discretion in the manner and scope of the voir dire inquiry of potential jurors. Fed. R. Crim. P. 24(a); *Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973); *United States* v. *Magana-Arevalo*, 639 F.2d 226, 228 (5th Cir. 1981). And the district court's decision regarding a potential juror's suitability should not be set aside unless it is manifestly erroneous. *Irvin* v. *Dowd*, 366 U.S. 717, 723-724 (1961). In this case, it is plain that the district court did not abuse its discretion in this regard.

Petitioner's basic claim is that the district court was too generous to the government in excluding po-

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[6] *United States* v. *Phillips*, 401 F.2d 301, 306 (7th Cir. 1968), cited by petitioner (Pet. 22), is not to the contrary. In that case, the court held that extrinsic offense evidence should have been excluded as unduly prejudicial. The court of appeals simply noted in passing that the fact of the defendant's acquittal on the extrinsic offense, even if revealed to the jury, would have been insufficient to cure the prejudice.

tential jurors with a possible bias in favor of petitioner due to their awareness of his earlier acquittal on the substantive fraud counts.[7] But the discharge of potential jurors with knowledge of petitioner's prior acquittal was wholly appropriate. It is true, of course, that a potential juror who, through pretrial publicity, has some knowledge of the facts of a case need not be excluded automatically. During trial the prosecution and defense will present the facts of the case and their arguments, and a juror can set aside extrajudicial sources of information and judge the case on the basis of the evidence presented at trial. *Irvin* v. *Dowd*, 366 U.S. at 723. The fact of petitioner's earlier acquittal, however, stands on a different footing from other types of pretrial publicity. It carries with it an imprimatur of judicial authority that does not exist with respect to the normal media account of a crime. Moreover, as noted above, it is a fact that was inadmissible at petitioner's trial. Thus, the district court's approach forestalled the backdoor admission of the acquittal that would have occurred if jurors were selected who had prior knowledge of the acquittal.

Moreover, as the court of appeals observed (Pet. App. 14a), knowledge of the prior acquittal, in defense counsel's words, "cut both ways." The circumstances of the Rule 29 acquittal led some to believe that it was unjust and that petitioner had gotten away with committing the crime. Thus, the decision

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[7] Petitioner does not appear to argue that biased jurors were permitted to sit on the jury. To the extent that he does, the court of appeals specifically found that the trial judge allowed no one to sit on the jury that had any knowledge of the prior proceedings unless they "convinced the judge of their ability to be impartial" (Pet. App. 14a).

to exclude all potential jurors with knowledge of the acquittal did not necessarily benefit only the prosecution. Rather, the trial court exercised sound judgment in excluding these jurors, and it cannot seriously be maintained that its decision was manifestly erroneous. See *Irvin* v. *Dowd*, 366 U.S. at 723-724. In any event, there is no suggestion that the jurors who did sit were unable to afford petitioner a fair trial, and even an erroneous exclusion of other jurors would therefore afford no basis for setting aside the results of that trial. See *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984).

5. Petitioner contends (Pet. 25-28) that the evidence was insufficient to establish that he entered into a conspiracy to obstruct justice. This contention is without merit.

Petitioner initially asserts (Pet. 26-27) that the district court erred in making its pretrial determination that a conspiracy existed and therefore that co-conspirator declarations could be admitted at trial. He argues that the district court erroneously relied upon the statement of his alleged co-conspirator, Carlos Marcello, in determining the existence of the conspiracy, which he characterizes as improper "bootstrapping." The conversation cited by petitioner is one in which he asked Marcello to assure that Lambert and Clothier did not meet with the grand jury, and Marcello agreed to be of assistance. Petitioner's statements and Marcello's response constituted the very agreement that formed their conspiracy to obstruct justice. The relevant statements on this tape were either not hearsay or within an established hearsay exception; petitioner's statements were admissions of a party (Fed. R. Evid. 801(d)(2)(A)) and Marcello's statements indicating his intent to

assist petitioner fell within the so-called "state of mind" exception (Fed. R. Evid. 803(3)). Hence, the district court's reliance on the tape recording was not "bootstrapping."[8] The tape recording in turn provided admissible and dispositive evidence of the existence of the conspiracy that provided a basis for the admission of other statements made by Marcello in furtherance of the conspiracy. See, *e.g.*, *United States* v. *DuFriend*, 691 F.2d 948, 951 (10th Cir. 1982), cert. denied, 459 U.S. 1173 (1983).

Finally, petitioner argues (Pet. 28) that the evidence, taken as a whole, was insufficient to establish that Marcello possessed the requisite intent to join a conspiracy with petitioner. This fact-bound claim was correctly rejected by the court of appeals (Pet. App. 10a-11a), and petitioner has provided no reason for this Court to review it. The jury below had in its hands an invaluable tool with which to conduct its inquiry—the tape recorded conversations of petitioner and of Marcello. See *United States* v. *Jannotti*, 673 F.2d 578, 604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982). Its reasonable interpretation of those tape recordings should not lightly be set aside.

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[8] Petitioner correctly notes (Pet. 26) that the Tenth Circuit does not permit "bootstrapping" in connection with evaluating the admissibility of co-conspirator hearsay. Thus, the decision below cannot create a conflict in the circuits; even if petitioner's objections were well-founded, this case would represent no more than a misapplication of the established law of the circuit. We note that the Sixth Circuit does permit "bootstrapping," yet this Court has consistently declined to grant certiorari to review that issue. See, *e.g.*, *Means* v. *United States*, cert. denied, No. 83-6866 (Nov. 26, 1984). For the reasons stated in text, the issue is not in any event presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10114